

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
HANNAH DiBONGE
(dba/GERMANTOWN PHARMACY)**

Petitioner

Hannah DiBonge

Larry E. Walker

For the Petition

Donna E. McBride, Esquire

Jody Kline, Esquire

Attorneys for the Petitioner

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Board of Appeals Case No. S-2700
(OZAH Case No. 07-25)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2700, filed on March 16, 2007, seeks a special exception, pursuant to §59-G-2.46 of the Zoning Ordinance, to permit a retail and service establishment (a drug store) in the existing Shady Grove Adventist Medical Center located at 19735 Germantown Road (Rt. 118), Maryland. The site is zoned C-T (Commercial-Transitional), and the Tax Account Number is 09-03436502. Petitioner seeks permission to establish a pharmacy in Suite 175, which she has leased on the lobby level (southeast corner) of a three-story medical office building. *See* Exhibit 11.

On March 30, 2007, the Board of Appeals issued a notice (Exhibit 13) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on July 27, 2007, at 9:30 a.m., in the Stella B. Werner Council Office Building. On June 14, 2007, Petitioner's attorney filed a letter (Exhibit 15) seeking to amend the petition by modifying the previously submitted floor plan and Statement of Operations. Notice of that motion was issued on July 2, 2007 (Exhibit 17). The motion was unopposed and therefore granted, under the terms of the notice.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated June 25, 2007, recommended approval of the petition, with conditions (Exhibit 16).¹ On July 12, 2007, the Planning Board voted unanimously to approve the petition, recommending the same conditions as Technical Staff, as set forth in the July 16, 2007 letter of its Chairman (Exhibit 18).

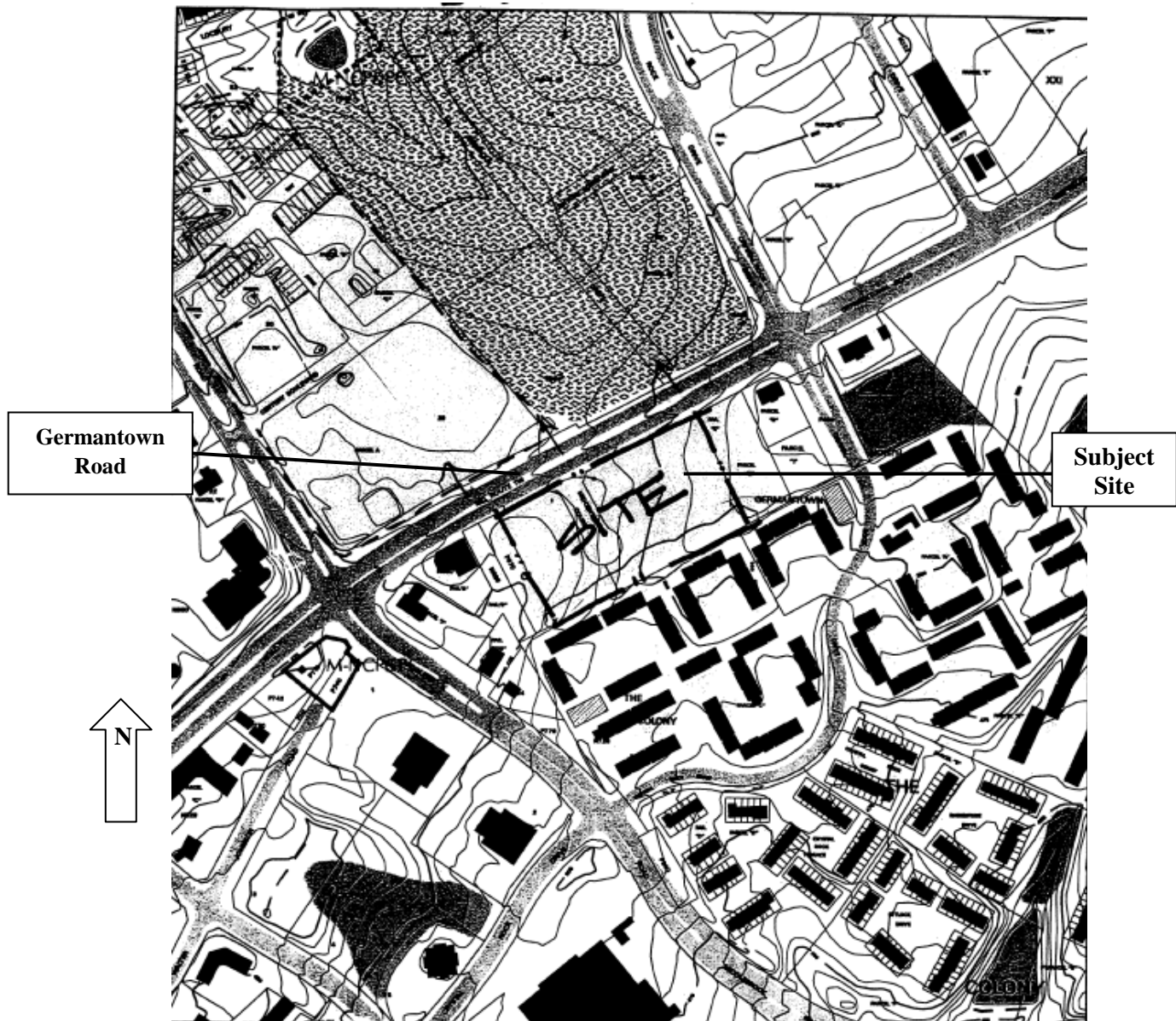
There has been no opposition or other community response to the requested special exception. A public hearing was convened as scheduled on July 27, 2007, and testimony was presented by Petitioner and a representative of the building's Master tenant, Adventist Health Care. There were no other witnesses, and the record closed on August 3, 2007, following receipt of the transcript. All the evidence supports granting the petition.

¹ The Technical Staff Report is frequently quoted and paraphrased herein.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject property is located at 19735 Germantown Road (Rt. 118), Maryland, approximately 3,000 feet west of the I-270 interchange. The Medical Center is zoned C-T (Commercial-Transitional), which is intended for low-intensity commercial buildings providing a suitable transition between one-family residential development and high-intensity commercial development. Technical Staff reports that the site is rectangular in shape and contains approximately 6 acres of land, as shown below on a “Location Map,” appended to Exhibit 16 as Attachment 1:



The three-story, Shady Grove Adventist Medical Center is located in Building 1 on Lot 5, and contains approximately 97,728 square feet of floor area. It is adjacent to the Shady Grove Adventist Emergency Medical Clinic, and the parking facilities for the medical complex contain 432 parking spaces. Exhibit 4(a). Photographs of the subject building are reproduced below:

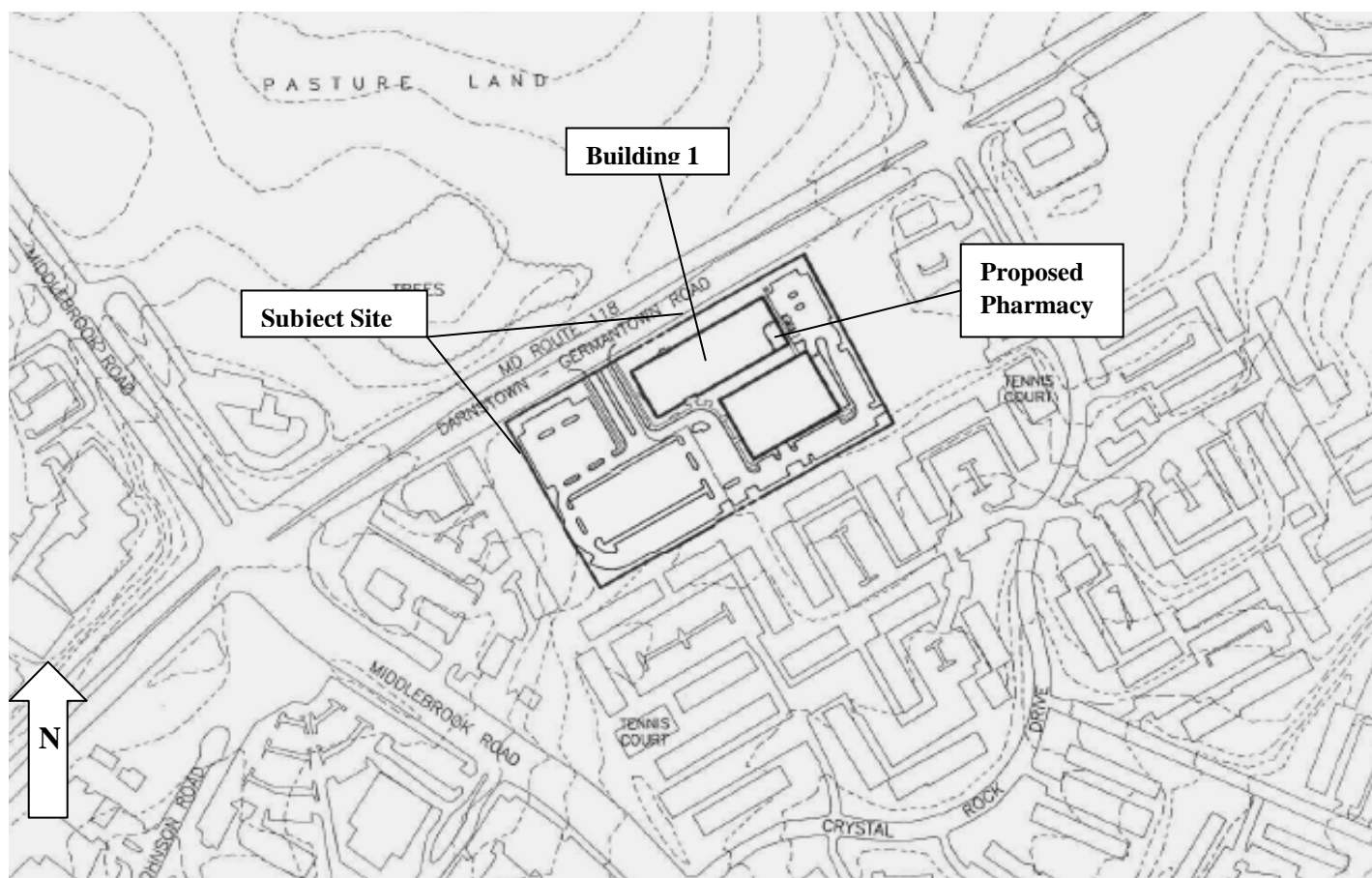


Front Entrance to Building (Exhibit 16, Photo appended to Attachment 8)



View of Building from Germantown Road (Rt. 118) – Exhibit 8(a)

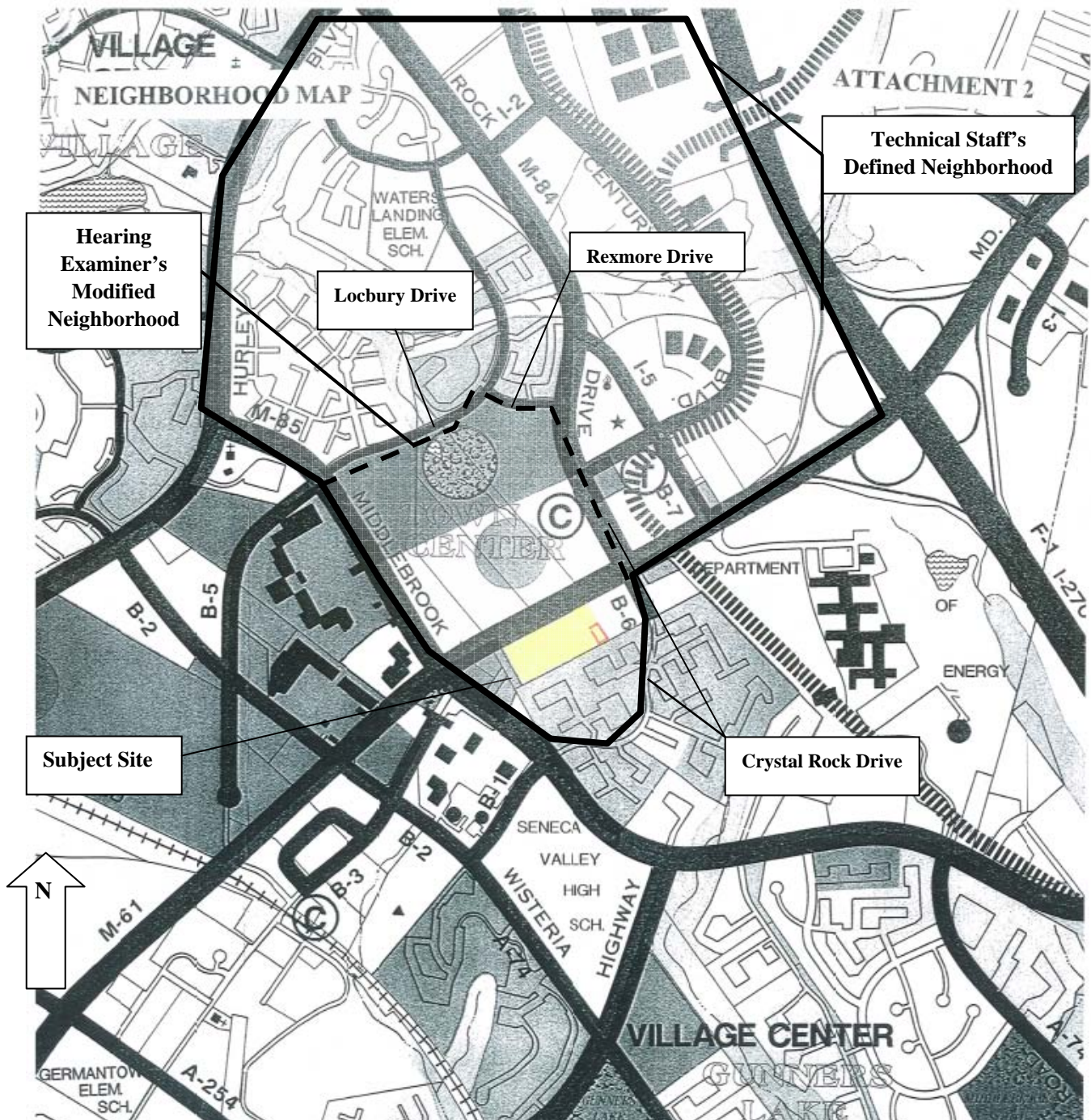
Direct vehicular access to the complex is from Germantown Road. The buildings, including the landscaping, lighting and parking plans (Site Plan Review #8-02010) were approved by the Planning Board on May 29, 2003. Exhibit 16, p. 2. The diagrammatic portion of Page 1 of the Site Plan (Exhibit 4(a)), is reproduced below:



B. The Neighborhood and its Character

The general neighborhood, as defined by Technical Staff (Exhibit 16, p. 2), is bordered by Father Hurley Boulevard to the north, I-270 to the east, Middlebrook Road to the west and Crystal Rock Drive to the south, as shown below by a solid line added to Technical Staff's Neighborhood Map, Attachment 2 to (Exhibit 16). The Hearing Examiner believes that this definition is unnecessarily large to the north and east. Any impact from this small retail establishment probably

would not extend beyond Crystal Rock Drive to the East and Locbury and Rexmore Drives to the north (dashed line on the map, below):

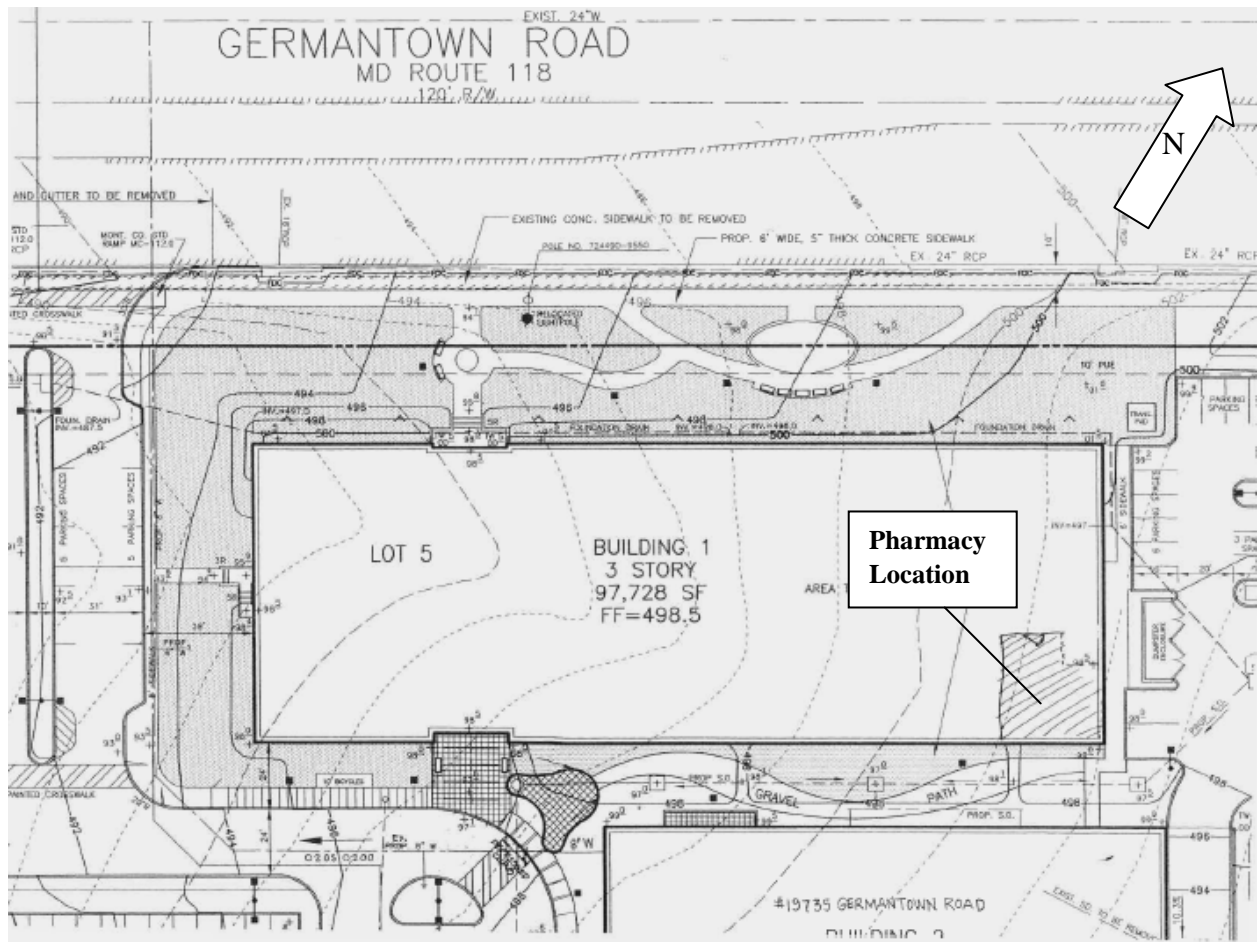


According to Technical Staff (Exhibit 16, p. 2), the Medical Center is surrounded by other commercial and retail uses along Germantown Road. A daycare center is located to the east on C-T

zoned property, and a restaurant and a bank are located southwest on commercially zoned property. A car dealership and other commercial/retail properties are located across Germantown Road, and the Colony Apartment complex is located directly adjacent to the south. As described by Petitioner, nearby there is a daycare, a Mercedes dealership, a Safeway Shopping Center, Germantown Shopping Center, and across the street from that, an apartment building on either side. Tr. 11.

C. The Proposed Use

Petitioner proposes to open a pharmacy within the existing medical office building located at 19735 Germantown Road (Rt. 118), Maryland. The 1,400 square-foot area devoted to the special exception use (Suite 175) is situated on the lobby level of Building 1, as shown below in an excerpt from page 2 of the Site Development Plan (Exhibit 21).²

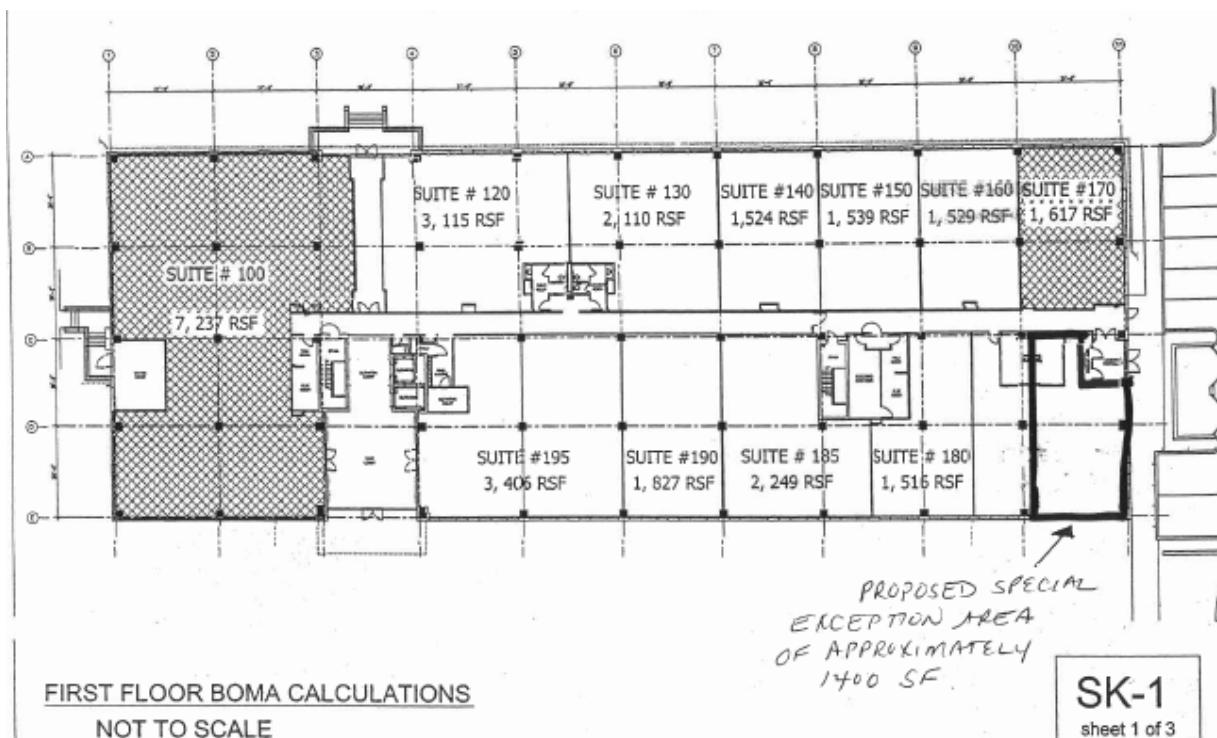


² Exhibit 21 is identical to page 2 of the Site Development Plan shown in Exhibit 4(b), except that Petitioner has added a hatched area to show the intended location of the pharmacy.

The location of the pharmacy (marked with an arrow) in Building 1 can also be seen in photographic Exhibit 8(e) of the exterior, southeast corner of the building:



This section of the building was formerly intended to be occupied by a medical office. The special exception area is accessed only from the interior lobby and thus has no direct access to the exterior of the building. The proposed layout of the Lobby level can be seen below on the revised Floor Plan (Exhibit 15(c)):



Petitioner, Hannah DiBonge, testified that she is a licensed pharmacist in Maryland and has been such for 12 years. She has a “Pharm. D,” which is a doctor of pharmacy, and is a certified geriatric pharmacist. Ms. DiBonge has five years of experience as a retail pharmacist, and seven years as a long term care pharmacy provider. Tr. 9.

The Proposed Use:

Petitioner proposes to operate a full service pharmacy on the site. According to the Amended Statement of Operations (Exhibit 15(a)), the pharmacy will be a member of the Professional Compounding Centers of America (PCCA), “which will make possible the provision of specially formulated prescription drug products prepared in final dosage form by the pharmacist.”

The services provided by the pharmacy will include maintenance of patient medication records, screening of such records for drug related problems, counseling on all prescription medications to ensure appropriate use and making available information on the proper use of over-the-counter medications. A limited inventory of health and beauty aids will be available, but primarily, Petitioner will offer products that are health oriented. There will be no sale of tobacco.

The Amended Statement of Operations indicates that the pharmacy will serve as a triage site for the community, providing advice on minor health problems and referring those in need to other health care practitioners. It will also serve as a wellness center, providing health screenings for hypertension and diabetes as well as providing information on health behavior. The pharmacy will be able to provide specialty compounding services in response to physicians’ prescriptions for special medication needs. The prescription area will be closed and secured, and only authorized personnel will have access to the pharmacy.

Petitioner observes, in the Amended Statement of Operations, that the proposed Germantown pharmacy “will complement medical service operations in the existing building and in the adjacent emergency treatment center to engender a more complete and convenient delivery of healthcare services.

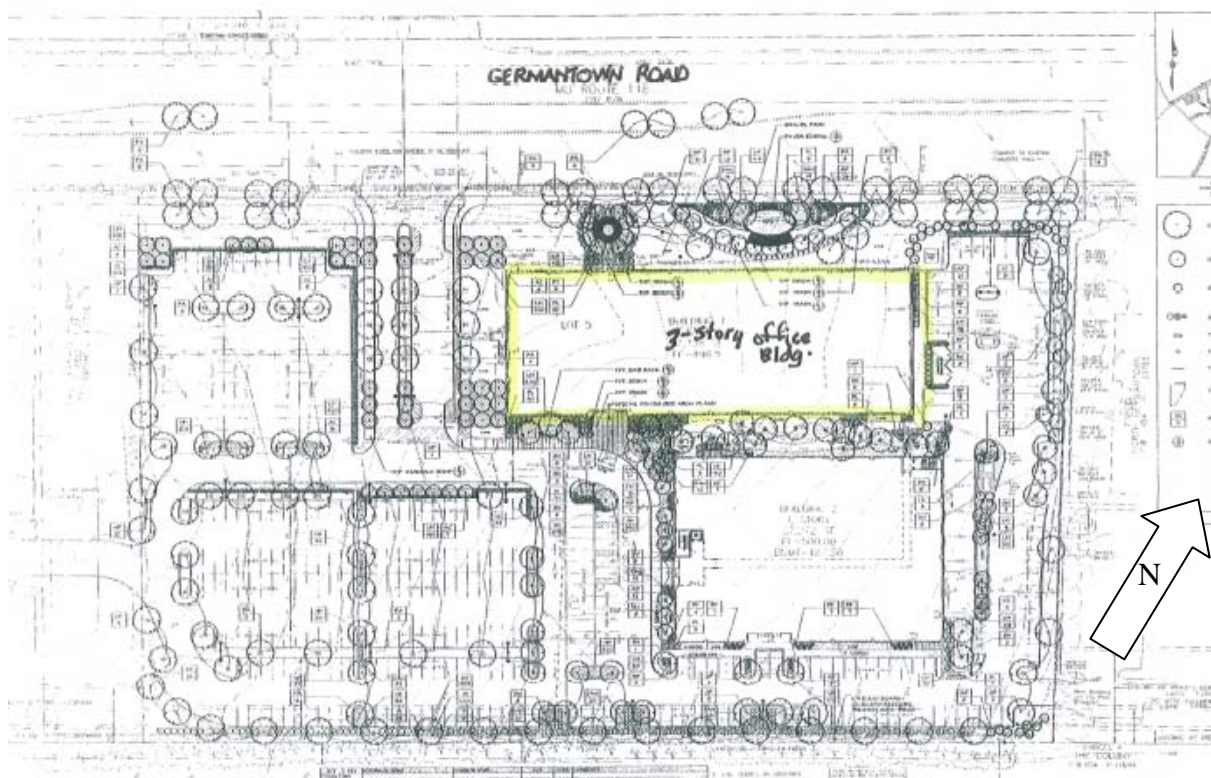
It will provide easy access to patients receiving medical attention and provide a convenient locale to fill prescriptions issued by physicians in the medical building and emergency treatment center.”

Hours and Staff:

The pharmacy would be open to the public Monday through Friday, from 8:30 a.m. to 7:00 p.m., and on Saturday from 8:30 a.m. to 2:00 p.m.; however, employees will arrive at 8:00 a.m., Monday – Saturday. There will be no Sunday hours. Technical Staff found these hours to be appropriate, and the Hearing Examiner agrees. Initially, there will be three employees, including Ms. DiBonge. In the future there may be up to 17 employees, but at no time will there be more than five employees present.

Landscaping, Lighting and Signs:

The area in which Ms. DiBonge intends to lease will not require any exterior changes to the property. According to Larry E. Walker, who runs the real estate department for the building’s Master tenant, Adventist Health Care, the special exception will affect neither exterior lighting nor landscaping. Tr. 20-21. Page 1 of the Landscape Plan (Exhibit 5(a)) is shown below:



Technical Staff noted (Exhibit 16, p. 5):

The Landscape and Lighting Plan was approved as part of Site Plan No. 8-02010B by the Planning Board on May 29, 2003. The site is well landscaped with trees, flowers and shrubbery throughout the site. This proposal does not require any additional landscaping nor does it require additional lighting to the existing building.

There will be no new external sign facilities; however, Petitioner may add its store identification to the existing monument sign outside the west side of the building.

Parking and Traffic:

As mentioned above, the Planning Board approved parking for the initial two-building development, and Mr. Walker testified that the pharmacy will have less impact on parking than having an all-medical office building, as was originally planned. Technical Staff repeatedly finds, in its report, that parking on site (432 spaces for the two buildings) will be adequate for the proposed use (Exhibit 16, pp. 3, 7, 10).

Ms. DiBonge does not anticipate that the pharmacy will generate any additional traffic because most of the business will come from the patients already there to see their doctors and/or the emergency room. Home deliveries will be made by just one driver leaving the premises, so there will be no traffic problems. Technical Staff concluded that a Local Area Transportation Review (LATR) traffic study was not required, in that the proposed pharmacy use would generate the same or fewer new trips than the originally planned, and previously approved, medical office use. Exhibit 16, pp. 4-5.

Environment:

An approved Natural Resources Inventory/Forest Stand Delineation (No. 42001337), an approved Final Forest Conservation Plan, and an approved Preliminary Plan (No. 12002003, approved November 8, 2001) already cover the site. The proposed facility will be located on the first floor of an existing building and is not expected to cause any adverse environmental impacts. Therefore, Technical Staff concluded there were no environmental issues in this case. Exhibit 16, p. 5.

D. The Master Plan

The property is located within the area covered by the *Germantown Master Plan*, approved and adopted in July 1989. As noted by Technical Staff (Exhibit 16, p. 3), the subject site is located in the Town Center area of Germantown, in Analysis Area TC-3. The site conforms to the Plan's statement on page 39 that the Analysis Area is suitable for "highway commercial" use, and for "office" use, with "C-5" or "C-T" zoning. Staff opined that the proposed medical support service at the subject location, with its existing approved landscaping, complies with the following Plan statements on page 41, regarding Area TC-3.

This Analysis area is appropriate for office buildings up to three stories in height in order to form a transition between the Town Center and the adjacent garden apartments. Any retail uses in this Analysis area should not establish a fragmented development pattern and should not conflict with the intent of the Village Centers and Town Center.

Planning for this Analysis Area should reflect its strategic location on a major entryway into Germantown. Building setbacks, landscaping along the commercial and road edge, and the screening of parking areas are important to achieve a visually pleasing entryway. These elements are also necessary to achieve compatibility with existing and proposed uses along this portion of MD 118.

The Master Plan also admonishes that care should be taken to insure compatibility with the adjacent residential community (page 41). As observed by Technical Staff, the proposed use will be located in an existing building surrounded by uses of similar intensity. Sufficient parking will be available on-site to accommodate the requested use, and vehicular access is available on Germantown Road, a major roadway. The landscape screening was reviewed as part of the overall development, and Technical Staff reports that "no significant adverse impacts are expected on adjacent residential areas or on other neighboring properties." Exhibit 16, p. 3. Many of the pharmacy customers will already be visiting medical offices at the Center, and thus their pharmacy visits will create no external impacts.

It should be noted that a retail establishment (drug store) is allowed by special exception in the C-T zone (Code §59-C-4.2 (d), which is one of the zones recommended for this site by the Master Plan. The Hearing Examiner therefore concludes, as did Technical Staff, that the proposed use is consistent with the *Germantown Master Plan*.

III. SUMMARY OF THE HEARING

The only witnesses to testify at the hearing were the Petitioner, Hannah DiBonge, and Larry E. Walker, a representative of the building's Master tenant, Adventist Health Care.

Hannah DiBonge (Tr. 9-18; 26-29):

Petitioner, Hannah DiBonge, testified that she is a licensed pharmacist in Maryland and has been such for 12 years. She has a "Pharm. D," which is a doctor of pharmacy, and is a certified geriatric pharmacist. Ms. DiBonge has five years of experience as a retail pharmacist, and 7 years as a long term care pharmacy provider. She has been planning this for a long time. Ms. DiBonge lives in Germantown, and "would like to serve the community in the best way that a pharmacy should."

Ms. DiBonge further testified that she is the lessee of the proposed special exception property, which occupies 1400 square feet. She plans to have a retail independent pharmacy which will provide medications to the community and customers and patients coming to the building. The pharmacy will have compounding and special needs medications, home use equipment, medical home use equipment, and will also provide delivery to patients who cannot physically come to the building to pick up their medications.

Ms. DiBonge stated that the hours of operation for the pharmacy will be Monday through Friday 8:30 a.m. to 7 p.m., and Saturday's 8:30 a.m. to 2 p.m. It will be closed on Sundays. Ms. DiBonge plans to arrive at 8 a.m. to set up for customers to arrive at 9 o'clock. Initially, there will be three employees, including Ms. DiBonge. In the future there may be up to 17 employees, but at no time will there be more than five employees present.

According to Ms. DiBonge, there may be a sign inside the building, and one on the existing monument sign outside the west side of the building. There will be no new external sign facilities. In the surrounding neighborhood, there is a daycare, a Mercedes dealership, a Safeway Shopping Center, Germantown Shopping Center, and across the street from that, an apartment building on either side.

Ms. DiBonge met with Cathy Matthews, the “Director of the Up County Regional Service Center,” who told her that, in light of the use, there was no need to meet with anybody else. Ms. DiBonge does not anticipate that the pharmacy will generate any additional traffic because most of the business will come from the patients coming to see their doctors and the emergency room. Deliveries will be made by just one driver leaving the premises, so there will be no traffic problems.

[In response to a question from the Hearing Examiner, counsel indicated that the original traffic estimate for the development assumed a clinic or a medical office in the space, but now it is going to be a pharmacy, which would generate less traffic than anticipated for the medical use. Therefore, the special exception would reduce the anticipated traffic for the entire development. Tr. 14-15. Also, counsel stated that the maximum permitted development in the C-T Zone is 0.5 FAR, which would limit this development to 131,344 square feet.³ The total proposed development, meaning both buildings, is 125,000 square feet. Tr. 15-18]

Ms. DiBonge identified the photographs in Exhibits 8(a) through (f), and that they accurately represented the scene today. [Her counsel noted that the Floor Plan (Exhibit 6), had been amended in Exhibit 15(c), to show that there is no external entry directly into the proposed pharmacy.]

Larry E. Walker (Tr. 18-25):

Larry E. Walker testified that he runs the real estate department for the building’s Master

³ The Site Development Plan (Exhibit 4(a)) indicates that the development is limited to 131,333 square feet, not 131,344 square feet. This difference is not material, especially since the combined development (*i.e.*, total of both buildings) contains only 125,000 square feet of floor space.

tenant, Adventist Health Care, which is a Maryland non-profit organization. The developer was Germantown II, LLC. Mr. Walker stated that the pharmacy will be located on the first floor in the southeast corner of the building. It will occupy less than 50 percent of the floor area of the first floor of that building. The area in which Ms. DiBonge intends to lease will not require any exterior changes to the property. It will affect neither exterior lighting nor landscaping.

Mr. Walker stated that both Adventist and physician tenants felt it would be “extremely advantageous” to have a pharmacy located in the building. It will have less impact on parking than having an all medical building, as originally planned. In his opinion, the use fits within the surrounding uses of the neighborhood, which he described, and there are adequate public facilities available to service the proposed use within the building.

According to Mr. Walker, there is nothing in the proposal that would in any way interfere with other occupants of the building as to noise, traffic, odors or their privacy. It would be especially advantageous to the patients and other people in the building not having to travel to other pharmacies.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a retail establishment (a drug store) in a medical office building. Characteristics of the proposed retail establishment use that are consistent with the “necessarily associated” characteristics of retail establishment uses in medical office buildings will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with retail establishment uses in medical office buildings, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggests that the inherent characteristics associated with the proposed use are “associated parking, lighting, noise generated by customers, and vehicular trips [by staff and

customers] to and from the site.” Exhibit 16, page 7. The Hearing Examiner would expand this list to include the existence of retail space, the accompanying goods, equipment and signage, the security paraphernalia associated with a retail pharmacy, and the intermittent entry and exiting of customers inside the building. Technical Staff concludes that there are no non-inherent effects sufficient to require a denial.

The Hearing Examiner would go even further, finding no non-inherent characteristics whatever in this case, based on the record. There will be no exterior building changes, other than the entry of the pharmacy’s identifier on an existing monument sign for the building. There are no significant transportation impacts that result from the proposed special exception, and parking demands will not impact on the adequate parking already available on-site. The physical and operational characteristics of the proposed pharmacy are no different from what is typically encountered with any small pharmacy. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use. Actually, this particular retail use will create less traffic and parking than similarly sized pharmacies at different sites because many of the Petitioner’s customers will likely come from the medical office building itself and from the immediate vicinity.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A drug store is a permissible special exception in the C-T Zone, pursuant to Code § 59-C-4.2(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.46 for a retail and service establishment (a drug store), as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the *Germantown Master Plan*, approved and adopted in July 1989. As noted by Technical Staff (Exhibit 16, p. 3), the subject site is located in the Town Center area of Germantown, in Analysis Area TC-3. The site conforms to the Plan's statement on page 39 that the Analysis Area is suitable for "highway commercial" use, and for "office" use, with "C-5" or "C-T" zoning. Staff opined that the proposed medical support service at the subject location, with its existing approved landscaping, complies with the Master Plan's statements regarding Area TC-3, as discussed in Part II. D. of this report.

As observed by Technical Staff, the proposed use will be located in an existing building surrounded by uses of similar intensity. Sufficient parking will be available

on-site to accommodate the requested use, and vehicular access is available on Germantown Road, a major roadway. The landscape screening was reviewed as part of the overall development, and Technical Staff reports that “no significant adverse impacts are expected on adjacent residential areas or on other neighboring properties.” Exhibit 16, p. 3. Many of the pharmacy customers will already be visiting medical offices at the Center, and thus their pharmacy visits will create no external impacts.

A retail establishment (drug store) is allowed by special exception in the C-T zone (Code §59-C-4.2 (d)), which is one of the zones recommended for this site by the Master Plan. The Hearing Examiner therefore concludes, as did Technical Staff, that the proposed use is consistent with the *Germantown Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will not noticeably alter the mix of uses in the surrounding neighborhood. The proposed use will not alter population density, design, scale or bulk, and proposes no new structure. Its activities will take place indoors, and the intensity and character of traffic and parking will also be virtually unchanged. On a positive note, the pharmacy will serve the needs of the many nearby medical offices. In Mr. Walker’s opinion, the use fits within the surrounding uses of the neighborhood, and there are adequate public facilities available to service the proposed use within the building.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. On the contrary, having a nearby pharmacy within a medical office building should enhance the value of surrounding properties by making needed services readily available.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use (*i.e.*, a pharmacy), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. There will be no lighting added outside the building as a result of the pharmacy.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed use is in a commercial, not residential area, which is consistent with the Master Plan recommendations. Given that the use will take place inside of an office building, it will have no effect on any neighboring one-family residential area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will improve health by providing

easily accessible pharmaceuticals to those utilizing area medical offices. Petitioner will be required to comply with all applicable health and safety regulations.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,⁴ as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”). The Technical Staff did do such a review, and it determined that the proposal will satisfy LATR without the need for a traffic study, because it will not generate any new trips beyond those anticipated for the space when the entire development was initially reviewed. Exhibit 16, pp. 4-5.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

⁴ Policy Area Transportation Review (PATR) is no longer considered in the APF review under the FY 2007 AGP.

Conclusion: Technical Staff concluded that “the subject use should not reduce the safety of vehicular or pedestrian traffic.” Exhibit 16, p. 10. Since it will not increase traffic or parking, and will not result in any external changes, the evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 16)] provide sufficient evidence that the specific standards required by Section 59-G-2.46 are satisfied in this case, as described below.

Sec. 59-G-2.46. Retail and service establishments.

Small-scale retail sales and personal service establishments may be permitted, provided the following requirements are met:

(a) The convenience goods and services provided are those usually requiring frequent purchase and a minimum of travel by occupants of the nearby commercial area and adjacent residential neighborhood; they include only the following types of establishments:

- (1) Barbershop;*
- (2) Beauty shop;*
- (3) Delicatessen;*
- (4) Drugstore;*
- (5) Dry cleaning and laundry pick-up station;*
- (6) Eating and drinking establishment, excluding a drive-in;*
- (7) Florist, provided, that a florist in existence in the C-T zone on April 1, 1986, is not required to obtain a special exception and is not a nonconforming use, subject to the special regulations of section 59-C-4.307(a);*
- (8) Newsstand;*

Conclusion: The proposed use is a drug store, one of the permitted establishments.

(b) Each of the uses stated in paragraph (a), above, must be the subject of a separate special exception;

Conclusion: The only use proposed is a drug store, and therefore only one special exception is sought.

(c) Parking in accord with the requirements of article 59-E, title "Off-Street Parking and Loading," must be provided for these uses on site, notwithstanding the exceptions to on-site parking stated in section 59-C-4.307 of the C-T zone; and

Conclusion: According to the approved Site Development Plan (Exhibit 4(a)), 430 parking spaces are required for the combined two buildings, and 432 will be provided.

Technical Staff reports that "Parking is sufficient to accommodate the use." Exhibit 16, p. 10.⁵

(d) If located in an office building also occupied by unrelated office uses, the establishment must:

(1) Be located on the street level story and occupy a maximum of 50 percent of the floor area of that story; and

(2) Be located and constructed so as to protect other occupants of the building from noise, traffic, odors and interference with privacy.

Conclusion: The proposed use, which is located on the street level of a three-story, medical office building, occupies 1,400 square feet (4.7 percent) out of a total of approximately 29,947 square feet on that floor. According to Mr. Walker, there is nothing in the proposal that would in any way interfere with other occupants of the building as to noise, traffic, odors or their privacy. It would be extremely advantageous to the patients and other people in the building not having to travel to other pharmacies. Tr. 24. In addition, Technical Staff indicates that the use "will not generate any noise, traffic, odors or other interference of privacy." Exhibit 16, p. 11.

⁵ Zoning Ordinance §59-E-3.7 provides that for "Office, general office, and professional buildings or similar uses,," parking shall be provided "in accordance with the parking requirements for office developments contained in Section 59-E-3.2." That section requires, at most, 3 spaces per 1,000 square feet of floor area, with lesser requirements applicable to locations close to Metro Stations. The Site Development Plan used the figure of 3 spaces per 1,000 square feet to calculate the parking needed for Building 1. For Building 2, the calculations were based on 5 spaces per 1,000 square feet because it was anticipated that that building might be used as an emergency health care facility, a use for which the Code does not specify the appropriate level of parking. Given these variables, the Hearing Examiner relies on the fact that the Site Development Plan has been previously approved and Technical Staff has clearly found the number of parking spaces provided to be appropriate.

D. Additional Applicable Standards

59-G-1.23 General Development Standards

59-G-1.23. General development standards.

- (a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The proposal satisfies all the dimensional requirements of the zone, as demonstrated by the following matrix from the Technical Staff report (Exhibit 16, p. 6), as modified by the Hearing Examiner for clarity:

<i>Development Standard</i>	<i>Required</i>	<i>Provided</i>
Maximum Net Area (gross floor area) based on the C-T Zone's maximum FAR of 0.5	131,333 s.f. (max) (0.5 X 6.03 acres)	125,000 s.f. (both buildings combined); 97,728 s.f. for (Bldg. 1, alone)
Building Coverage (Both Buildings)	35 percent (max.)	22.8 percent
Green Area (Both Buildings)	10 percent (min.)	31.3 percent
Minimum Setback from street	20 feet	35 feet
--from lot line	67 feet	112 feet
Building Height	35 feet	35 feet (3 stories)
Minimum Parking	430 spaces	432 spaces

- (b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted in Part II. C. of this report, all the parking spaces required by Zoning Ordinance §59-E, have already been provided in accordance with previously approved plans for the entire development.

- (c) *Minimum frontage * * **

Conclusion: Not applicable to this special exception.

- (d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: A Final Forest Conservation Plan was approved, per Technical Staff. Exhibit 16, p. 7.

- (e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. This special exception will have no impact on water quality since it will not cause any external changes.

- (f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: No new signage facilities are planned. A store identifier may be placed on an existing monument sign.

- (g) *Building compatibility in residential zones. . . .*

Conclusion: Not applicable. The site is not in a residential zone.

- (h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The site is not in a residential zone, nor does it produce any light that will intrude into a residential zone. A photometric study (Exhibit 5(c)) demonstrates no significant light spillage into adjacent properties.

59-G-1.24. Neighborhood need.

Conclusion: Not applicable. The site is not one of the listed special exceptions.

59-G-1.25. County need.

Conclusion: Not applicable. The site is not one of the listed special exceptions.

59-G-1.26. Exterior appearance in residential zones.

* * *

Conclusion: Not applicable. The site is not in a residential zone.

Based on the testimony and evidence of record, I conclude that the retail pharmacy use in a medical office building proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2700, seeking a special exception for a retail and service establishment use (a drug store) in Suite 175, on the lobby level of a three-story medical office building (Shady Grove Adventist Medical Center) located at 19735 Germantown Road (Rt. 118), Maryland, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witness and representations of counsel identified in this report.
2. Petitioner's pharmacy floor space is limited to a maximum of 1400 square feet.
3. Petitioner's store hours are limited to 8:30 a.m. to 7 p.m., Monday through Friday, and 8:30 a.m. to 2 p.m. on Saturday; however employees may arrive at 8:00 a.m. each day.

4. Petitioner may employ up to 17 employees, but may not have more than five employees operating in the pharmacy at one time.
 5. Any external signage identifying the special exception will be limited to previously approved sign facilities for the building.
 6. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein.
- Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: August 28, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner